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No. 14-6368

In the
Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. §1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

PARTIES TO THE PROCEEDING

Petitioner is Michael B. Kingsley, appellant below and plaintiff in the district court.

Respondents are Stan Hendrickson and Fritz Degner, appellees below and defendants in the district court.

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INTRODUCTION

This Court has long recognized that the fact of incarceration fundamentally changes the constitutional analysis of a detainee's rights. While a detainee does not shed his constitutional protections at the jailhouse door, many of the constitutional rights enjoyed by free individuals are either incompatible with jail life or must be substantially modified to account for the realities of incarceration. What is more, this Court has recognized that corrections officials have unique expertise and need special protections given their constant interaction with dangerous individuals who by dint of their incarceration have substantial time to contemplate potential litigation. And while the fact of incarceration fundamentally changes the constitutional analysis, the detention status—pretrial versus post-conviction—is far less consequential. This Court has recognized that pretrial detainees can be every bit as dangerous as post-conviction detainees and has routinely applied similar tests to pretrial and post-conviction detainees.

Despite all this, petitioner insists that the Fourth Amendment standard for excessive force claims by free individuals should apply to pretrial detainees, either directly or via the Due Process Clause. But that approach ignores the degree to which the fact of incarceration fundamentally changes the constitutional analysis. It also guarantees that virtually every complaint of excessive force by a pretrial detainee will necessitate a jury trial.

This Court's precedents provide a clear and superior path for resolving this case. This Court has

already made clear that the Due Process Clause, and not the Fourth Amendment, provides the proper framework for addressing excessive force claims brought by pretrial detainees. This Court has likewise held that what the Due Process Clause forbids is punishment, and that punishment has a subjective component. And this Court has already determined the requisite intent that renders the use of excessive force on a detainee unconstitutional. While the Court articulated that test while addressing an Eighth Amendment claim brought by a post-conviction detainee, the test is fully applicable to a due process claim brought by a pretrial detainee. Indeed, the Court's test for excessive force in the incarceration context was expressly based on a test articulated by Judge Friendly in addressing a due process claim by a pretrial detainee.

What Judge Friendly recognized four decades ago remains equally true today: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). Judge Friendly understood that the Fourth Amendment excessive force standard applicable to free individuals was misplaced in the incarceration context, where a few guards are constantly interacting with numerous detainees who, whether being held pretrial or post-conviction, are "not usually the most gentle or tractable of men and women." *Id.* The test applied by this Court to the excessive force claims of incarcerated individuals fully accounts for that reality and should govern petitioner's claim. The instructions below were, if

anything, overly protective of petitioner's rights, and yet the jury rejected petitioner's claim after a full jury trial. There is no basis for disturbing that judgment.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Michael B. Kingsley was arrested for felony possession of cocaine with intent to manufacture, distribute, or deliver in April 2010 and convicted of that crime in October 2011. JA103.[1] Reflecting the seriousness of his crime, petitioner was required to post a bond, which he failed to do before the events in question. While awaiting trial for what would be his sixth felony conviction in less than 10 years, *id.*, petitioner was incarcerated at the Monroe County Jail in Sparta, Wisconsin. JA126. Like all facilities of its kind in Wisconsin—and, indeed, most such facilities throughout the Nation—the Monroe County Jail houses individuals like petitioner who are detained pending trial, as well as individuals who have been convicted of crimes. And like most jails, the pretrial detainees in the Monroe County Jail are often accused of far more serious crimes than the post-conviction detainees. By law, individuals convicted of crimes that result in sentences of greater than one year do not serve their sentences in the Monroe County Jail, but individuals accused of much more serious offenses are detained there pending trial. Wis. Stat. §§973.02 & 302.31.

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[1] *See also* Court Record Events, *State v. Kingsley*, Monroe Cnty. Case No. 2010CF000134, Wis. Ct. System Cir. Ct. Access, http://perma.cc/6tv8-6edq.

At 10:30 p.m. on May 20, 2010—30 days into petitioner's pretrial detention and after three separate appearances by petitioner before a Wisconsin judge—Monroe County Deputy Sheriff Nicholas Manka was conducting cell checks in the Jail when he noticed that a piece of paper was covering the overheard light in petitioner's cell. JA42. Manka directed petitioner to remove the paper from the light because the paper made it difficult to see into petitioner's cell and created a potential fire hazard. JA44; JA127; R157, pp. 130-31. Petitioner twice refused to remove the paper, sarcastically telling Manka that he better call in an emergency response team to remove it. JA127.

At the shift change the next morning, Manka told Monroe County Deputy Sheriff Karl Blanton about petitioner's refusal to remove the paper covering the light in his cell. R158, pp. 53-54. Blanton asked petitioner to remove the paper, and, for the third time, petitioner failed to comply. *Id.* Blanton made several follow-up requests, which petitioner also rebuffed. *Id.*

Then Sergeant—now Lieutenant—Stan Hendrickson learned of petitioner's intransigence and asked him to remove the paper from the light. JA181. As even petitioner concedes, Hendrickson told him: "It's a direct order. I'm telling you to take the paper off the light." JA128; R155, p. 20. Consistent with his responses to Manka and Blanton, petitioner refused. *Id.*

Hendrickson reported petitioner's refusals to Robert Conroy, who was the Monroe County Jail Administrator at the time. R157, pp. 88-90. When Conroy arrived at the jail later that morning, he too attempted to get petitioner to remove the paper from

the light. Conroy's efforts proved equally unsuccessful. JA129.

Recognizing that the only way that full visibility into petitioner's cell would be restored and the potential fire hazard eliminated would be to remove the paper themselves, the jail officials decided to do just that. Conroy informed petitioner that jail staff would remove the paper from the light, but he explained that petitioner would first need to be moved to a separate "receiving" cell. R157, pp. 47, 91. Specifically, Conroy told petitioner that the transfer was necessary to permit jail staff to enter the cell safely and remove the paper and was also appropriate as a disciplinary measure for his recalcitrance. R154, pp. 8-10. Nothing if not consistent, petitioner reported that he would not cooperate with jail officials' efforts to remove the paper or remove him from the cell. R154, p. 8.

Jail officials, including Conroy, Blanton, Hendrickson, Deputy Sheriff Fritz Degner, and Deputy Sheriff James Shisler, then met to discuss how to transfer petitioner safely to the receiving cell. Those jail officials had decades of incarceration-related experience and training. Degner has been a deputy sheriff in Monroe County since July 1992 and a law enforcement officer for more than 30 years, JA196-97, and Hendrickson has worked at the Jail since August 2000, JA181. Degner and Hendrickson both hold professional certifications issued by the State of Wisconsin, Degner as a law enforcement officer and Hendrickson as a jail officer, and both are trained to deal with situations like the one created by petitioner. R155, pp. 16, 63.

Drawing on that knowledge and experience, and consistent with their training, the jail officials decided that the best course of action for all involved was to have Hendrickson return to petitioner's cell with Blanton, where they would handcuff petitioner for transfer. R157, p. 93. Degner would stand by with an electronic control device (more commonly known as a Taser) as a precaution, and Conroy and Shisler would assist as needed. *Id.*

The officials went to petitioner's cell to execute their plan. Hendrickson ordered petitioner to stand up and turn his back to the cell door so that he could be handcuffed. JA290; R157, pp. 63, 66. Petitioner failed to comply and continued lying face down on his bunk. JA291. He would later testify at trial that he was afraid to move because Degner was pointing a Taser at him, but a video recording of the cell transfer confirmed that Degner had done no such thing. R154, pp. 13-15; R155, p. 67; R157, pp. 65-66; R148, Ex. 13. When petitioner refused to stand up, Conroy told him to put his hands behind his back. Petitioner put his hands along the sides of his body, and the officers entered the cell. R157, p. 95; R158, pp. 59-60.

Hendrickson and Blanton attempted to handcuff petitioner while he lay face down on his bunk. R157, p. 96. Petitioner resisted, tensing and moving his arms, preventing Hendrickson from handcuffing him. R155, pp. 25-26; R157, p. 68. Blanton assisted Hendrickson in getting control of petitioner's arms so that he could be handcuffed. R158, p. 61; R155, p. 26. Hendrickson double locked the handcuffs, which prevented them from tightening once they were on,

and checked them to make sure they were not too tight. R154, p. 22; R155, p. 28; R154, p. 120.

Once petitioner was handcuffed, Hendrickson and Blanton helped him into a sitting position on his bunk and tried to assist him up. R155, p. 26; R158, p. 64. Petitioner was given the option to walk out of his cell, but he refused, claiming that his foot hurt. R155, p. 26; R158, pp. 64-65. Petitioner refused to respond to questions regarding the alleged injury to his foot. He also refused to walk. R154, pp. 16-19; R155, pp. 26-27; R158, pp. 64-65. Before he was removed from his cell, petitioner was warned that if he resisted the officers, the use of the Taser might be necessary. He responded by stating that he "would sue" if a Taser were used. R155, p. 68.

Faced with petitioner's persistent obstinance, Hendrickson and Blanton were forced to carry petitioner out of his cell. Once petitioner was removed from the cell, the officials laid him face down in the main hallway of the Jail and inquired after the status of his foot. R155, pp. 27-29; R158, pp. 65-67; R149, Ex. 520; R155, pp. 65, 70-71. Petitioner responded with only silence, so the officers carried him to the receiving cell. R155, p. 29; R158, p. 67; R149, Ex. 520, R155, pp. 65, 70-71.

The officials attempted to remove petitioner's handcuffs once he was safely inside the receiving cell. JA173-74; R154, p. 23; R157, p. 76. Blanton first attempted to remove the handcuffs, and petitioner refused to cooperate, pulling his arms apart, moving his hands, lifting his torso, and tensing his arms. JA174-76, 185. Petitioner later admitted that he was tensing his body and flexing his arms, that he was

"quite belligerent," and that, as a result, the officers were having difficulty removing the handcuffs. R157, pp. 72, 77-78.

Despite the officials' repeated instructions to calm down and to stop resisting their efforts, petitioner continued resisting and struggling, even growling aggressively. JA176-77; R154, pp. 24-25; R155, pp. 32-33. Under the best of circumstances, it can be difficult to remove handcuffs because of the small key hole; when a subject is moving around and otherwise resisting efforts to remove handcuffs, the task is more difficult still. JA185, 223; R154, p. 116. As the officials struggled to remove the handcuffs, petitioner offered some expletive-laced imperatives to "get ... off" and "get ... out." R154, p. 25; R155, pp. 33-34.

The officials persisted in attempting to remove the handcuffs, largely for petitioner's own safety. JA183; JA178; R154, p. 23. The receiving cells in the Jail are small concrete and cinder block cells containing only a concrete bunk with a raised metal lip and a sink and toilet encased in concrete. R154, pp. 26-28; R149, Ex. 509 B. There is a risk that an individual left alone in such a cell with his hands cuffed behind his back could fall and be injured. R154, p. 123. As a rule, officers in the Jail do their utmost to avoid leaving inmates in the receiving cells alone while handcuffed. R154, pp. 23-24. The officials were also concerned that petitioner could escalate the situation and begin actively fighting them. JA176-77, 189; JA200-01; R154, pp. 25-26.

At that point, faced with the facts on the ground as he perceived them in the moment, and consistent with his training, Hendrickson believed that all

suitable or reasonable alternatives had been exhausted, and he instructed Degner to apply a contact stun to petitioner with his Taser. JA188-92. Hendrickson hoped that the single brief use of the Taser would gain petitioner's compliance and, in turn, allow the officers to remove the handcuffs and exit the receiving cell safely. JA191-92. Following Hendrickson's order, Degner applied a five second contact stun to the back of petitioner's right shoulder. JA202-03.[2]

Petitioner was undeterred by the use of the Taser and continued struggling against the officials, who were still unable to remove the handcuffs. JA203; JA178; JA191-93. Conroy ordered the officers out of the cell and continued to monitor petitioner via a closed circuit camera. JA193; JA178-79; JA203; R154, p. 31-33. Conroy and three other officers re-entered the cell twelve minutes later to renew the effort to remove petitioner's handcuffs. R154, pp. 32-33. Although petitioner again resisted, Conroy's efforts were ultimately successful, and the handcuffs were removed. R154, pp. 33-34.

Conroy placed petitioner on medical watch, and a nurse visited petitioner in his cell. JA46; R154, pp. 34-35; R149, Ex. 513; R.149, Ex. 512. Petitioner refused to see the nurse and never sought medical attention as a result of the incident. R157, p. 86.

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[2] The use of a Taser in contact stun mode, although painful, does not result in neuromuscular incapacitation or injury. JA224-25; R154, pp. 67-68.

B. Procedural History

True to his word, petitioner filed suit *pro se* against several Monroe County Jail officials under 42 U.S.C. §1983 alleging that they had used unconstitutionally excessive force and deprived him of due process. JA292. The district court screened petitioner's complaint and, as relevant here, allowed petitioner to proceed with excessive force claims against Blanton, Conroy, Degner, and Hendrickson.

The jail officials moved for summary judgment, contending that their actions did not constitute excessive force as a matter of law and that, in the alternative, they were entitled to qualified immunity. JA48. The district court denied the motion. The district court held that "a reasonable jury could conclude that" the force used was excessive and that the officials "acted with malice and intended to harm plaintiff when they used force against him." JA53-54. The district court denied the officials qualified immunity for the same reasons. JA54.

After substantial discovery, which followed the appointment of counsel for petitioner by the district court, and after Conroy and Blanton were voluntarily dismissed from the suit, the trial on petitioner's excessive force claims against Hendrickson and Degner commenced. R77; R127; R131. That trial lasted three days—from October 15 to October 17, 2012—and involved the testimony of all but one of the jail officials who played a part in transferring petitioner between cells, as well as expert testimony. In addition to recounting the relevant facts in detail, the officers explained that their conduct was entirely consistent with their extensive training and the

guidelines promulgated by the State of Wisconsin governing the use of a Taser. Those guidelines provide that use of a Taser is appropriate to overcome active resistance, or the threat of such resistance, by a prisoner, where active resistance is defined as a prisoner's efforts to physically counteract a jail official's control efforts under circumstances in which the behavior itself, the environment in which the behavior occurs, or other factors create a risk of bodily harm. JA218-21; R149, Ex. 517; JA261-69; JA168-69. John Peters, a national expert in the use of force by law enforcement officers, testified that the use of a Taser in contact stun mode—the mode used here—was reasonable based on petitioner's conduct. JA207-16; JA224-25.

Before the matter was sent to the jury, the parties submitted competing instructions on the contours of petitioner's excessive force claim. Petitioner sought an instruction based on the Fourth Amendment excessive force standard used for claims by free individuals, while respondents sought an instruction used for excessive force claims by detainees incarcerated after conviction. The district court opted for a middle ground and instructed the jury, in relevant part, as follows:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and

- Any efforts made by defendants to limit the amount of force used.

A person can be harmed even if he did not suffer a severe injury.

JA277-78.

The jury returned a verdict in favor of Hendrickson and Degner, and the district court entered a final judgment dismissing the case. JA284-87.

Petitioner appealed to the U.S. Court of Appeals for the Seventh Circuit, arguing, as relevant here, that the jury was erroneously instructed on his excessive force claim. Petitioner contended "that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments, and, as a result, wrongly instructed the jury to consider the subjective intent" of the jail officials. JA289. In their briefing before the Seventh Circuit, Hendrickson and Degner argued that, if anything, the instruction was insufficiently demanding when it came to intent, that the judgment should be affirmed, and that, in the alternative, the officers were entitled to qualified immunity. CA7 Appellee Br. 23-28.

The Seventh Circuit affirmed on the merits, holding "that the instructions were not an erroneous or confusing statement of the law of th[e] circuit." JA289. Writing for the majority, Judge Ripple explained that Seventh Circuit precedents "recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind" when evaluating a pretrial detainee's excessive force claim. JA303. Judge Ripple also noted that "the requisite state of mind" is "at least recklessness." *Id.*; *see* JA307 ("our cases are clear that

the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases"). Judge Hamilton dissented and argued that a pretrial detainee need only "prove that a correctional officer used objectively unreasonable force" in order to prevail on an excessive force claim. JA311.

The Seventh Circuit denied petitioner's request for rehearing and rehearing en banc. JA334-35.[3]

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the fact of incarceration fundamentally changes the constitutional analysis. The constitutional rights enjoyed by free individuals are either wholly inapplicable in the incarceration setting or must be substantially modified to reflect the realities of incarceration. Importantly, this Court has expressly recognized that while the fact of incarceration is a game-changer, the detainee's precise status as a pretrial or post-conviction detainee is not. The fact and realities of incarceration are the same for both kinds of criminal detainees, and in practice many pretrial detainees may be more dangerous than post-conviction detainees, particularly at a local jail like that at issue here. *See Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979). This Court has likewise emphasized the importance of judicial deference to the difficult

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[3] During the course of these proceedings, petitioner filed another lawsuit against a Monroe County Jail deputy alleging excessive force. That case was tried to a jury on December 8, 2014, and the jury returned a verdict in favor of the deputy and against petitioner. *See Kingsley v. Raddatz*, No. 13-cv-432-bbc (W.D. Wis.).

decisions routinely made by corrections officials and has expressly held that the need for deference does not turn on the "happenstance" of whether the plaintiff is a pretrial or post-trial detainee. *Id.* at 547 n.29.

This Court's precedents provide a clear path for resolving the question presented here. This Court has already made clear that the Due Process Clause governs the claims of pretrial detainees, and what the Due Process Clause forbids is punishment. This Court has made equally clear that punishment necessarily requires a subjective intent to punish. Finally, this Court has specified the requisite subjective intent to punish in the precise context of excessive force claims in the incarceration setting. A detainee must demonstrate that force was used maliciously and sadistically for the very purpose of causing harm. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986). To be sure, both *Whitley* and *Hudson* involved claims by post-conviction detainees, but that makes no difference. Not only has the Court generally treated the claims of pretrial and post-conviction detainees as interchangeable, but the Court "derived" the *Whitley-Hudson* standard from a seminal opinion of Judge Friendly resolving the due process claims of a pretrial detainee. At a bare minimum, the Due Process Clause would require a subjective intent akin to recklessness, and the jury here was instructed based on a recklessness standard and returned a verdict in favor of respondents.

Rather than adopt a standard derived from due process and tailor-made to excessive force claims in the incarceration context, petitioner urges this Court

to adopt a purely objective standard based on the Fourth Amendment principles that govern excessive force claims by free individuals. But any direct application of Fourth Amendment principles would be a non-starter, as it would ignore the reality that the fact of incarceration fundamentally changes the requisite constitutional analysis. Moreover, to the extent that the Fourth Amendment standard must be modified to take into account the realities of prison life, petitioner's approach makes little practical or doctrinal sense. Practically, if the Fourth Amendment standard must be substantially modified for the incarceration context, there is little justification for ignoring the *Whitley-Hudson* test which is already perfectly suited for the incarceration setting. Doctrinally, there is a fundamental misfit between the objective reasonableness test, which is properly the focus of the Fourth Amendment when it comes to the claims of free individuals, and the due process inquiry. A host of statutes, regulations and training manuals address the appropriate use of force by corrections officials, but not every unreasonable search or seizure constitutes punishment, and the Due Process Clause prohibits only the latter. Indeed, this Court has expressly rejected a negligence standard as misplaced in the due process context, and petitioner's argument would render any unreasonable or undue use of force a due process violation.

Petitioner and the government attempt to read a purely objective test into this Court's decision in *Bell*, but *Bell* holds just the opposite. Punishment is the *sine qua non* of a due process violation, and the effort to divide punishment from a use of force that appears unnecessary in hindsight when considered in the calm

of the courtroom requires a subjective inquiry. Petitioner's last ditch effort to view every use of force against a detainee as a continuing or new seizure that must be tested for reasonableness is even more inconsistent with this Court's precedent. It would also work a revolution in prisoner litigation, as there is no logical reason the analysis would be limited to pretrial detainees.

Finally, even if this Court rejects the approach of the majority of the Circuits, including the Seventh Circuit, and adopts a purely objective test, it should nonetheless affirm for two independent reasons. First, such a decision would make qualified immunity for respondents clearly appropriate. There is no question that the Seventh Circuit required the plaintiff to show at least recklessness, and a jury instructed consistent with Seventh Circuit precedent rejected petitioner's claims. This Court is free to reject the Seventh Circuit's analysis on the merits, but in doing so the Court would only underscore that respondents did not violate clearly established law. To the contrary, their actions were fully consistent with governing Circuit precedent, which is enough to provide them qualified immunity and spare them a second trial. Second, as the government argues, another trial is unnecessary because proper respect for the province of the jury would allow the instructions here to be read consistent with the government's conception of an objective reasonableness test.

ARGUMENT

I. The Fact Of Incarceration Profoundly Affects The Analysis Of Constitutional Claims Brought By Incarcerated Criminal Detainees.

This Court has long recognized that the fact of incarceration fundamentally affects the constitutional rights of incarcerated individuals relative to those enjoyed by individuals at liberty. While "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), the constitutional rights of inmates are "subject to restrictions and limitations" that make the contours of those rights quite unlike the rights of free individuals. *Bell*, 441 U.S. at 545. The fundamental difference in constitutional rights based on one's incarceration is a result of the fact that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Wolff*, 418 U.S. at 555 ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen").

This basic principle provides the foundation for this Court's cases involving the constitutional rights of incarcerated individuals. For example, in *Pell v. Procunier*, 417 U.S. 817, 822 (1974), "start[ing] with the familiar proposition that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,'" this Court held that a ban on inmate media interviews did not run afoul of the First Amendment. Rather than applying the

typical First Amendment analysis applied to claims by individuals at liberty, the Court identified the ban as being "peculiarly within the province and professional expertise of corrections officials," noted that "courts should ordinarily defer to the[] expert judgment" of prison officials in such matters, and held that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response," the ban must be upheld. *Id.* at 827.

Just three years later in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), the Court once again relied on the premise that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights." Based on that premise, the Court upheld prison regulations prohibiting meetings of a prisoners' labor union, inmate solicitation of other inmates to join the union, and mailings concerning the union from outside the prison against First and Fourteenth Amendment challenges. The Court held that those restrictions "barely implicated" inmates' constitutional rights and were "rationally related to the reasonable, indeed to the central, objectives of prison administration." *Id.* at 129-30.

The Court formalized its analysis of constitutional claims by incarcerated individuals in its seminal opinion in *Turner v. Safley*, 482 U.S. 78 (1987). The Court definitively rejected the notion that constitutional claims by incarcerated individuals should be subjected to the same levels of scrutiny typically applied to constitutional claims of free citizens. Instead, the Court adopted a much less demanding standard that gives substantial deference

to the judgments made by prison officials. The Court emphasized the limitations on judicial inquiries into matters of prison administration and recognized that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. Of course, the Court's more relaxed scrutiny of constitutional claims in the incarceration context does not leave detainees' rights unprotected. In *Turner* itself, the Court rejected Missouri's limitations on prisoner marriages, while upholding the restrictions on correspondence. But *Turner* makes clear that the constitutional norms that govern outside prison walls do not readily translate to the claims of detainees and underscores the need for deference to the often difficult judgment calls made by corrections officials.

While the fact of incarceration is a game-changer that fundamentally affects the nature of the constitutional analysis, the precise nature of the detention—pretrial versus post-conviction—is far less relevant. When *Turner* synthesized the Court's previous cases involving constitutional claims of detainees, it drew no distinction between cases like *Pell* and *Jones* involving post-conviction detainees and cases like *Bell* involving pretrial detainees. *Id.* at 86-87.[4] More to the point, in *Bell* this Court expressly

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[4] *Turner* is hardly idiosyncratic in this respect. This Court has routinely relied on post-conviction cases in cases involving pretrial detainees, *see, e.g., Bell* and *Block*, and vice-versa, *see, e.g., Hudson* and *Whitley*. Lower courts, moreover, have routinely invoked *Turner* in cases involving pretrial detainees.

stated that the "principle" that confinement constricts an inmate's constitutional rights "applies equally to pretrial detainees and convicted prisoners." *Bell*, 441 U.S. at 546. "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* A pretrial "detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.*; *see id.* at 554 (The constitutional "rights of prisoners and pretrial detainees are ... subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution."). The fact that pretrial detainees are afforded a presumption of innocence in the criminal proceedings still pending against them does not alter this analysis. *Id.* at 533 (the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

The Court is not alone in its recognition that the fact of incarceration (and not the precise detention status) is the critical dividing line, as demonstrated by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §1997e. The PLRA acknowledges that incarcerated individuals, unlike individuals at liberty, are in near constant contact with state actors and because of their incarceration have ample time to contemplate potential litigation against those state actors. The PLRA thus includes numerous features designed to deter frivolous litigation against prison officials. *See,*

See, e.g., *Ortiz v. Downey*, 561 F.3d 664 (7th Cir. 2009); *Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010).

e.g., §1997e(a) (requiring exhaustion of administrative remedies); §1997e(c)(1) (allowing the court to *sua sponte* dismiss "frivolous" claims). Importantly, Congress made the PLRA applicable to anyone "confined in any jail, prison, or other correctional facility;" thus, its provisions are equally applicable to both pretrial and post-conviction detainees. 42 U.S.C. §1997e(a); *see, e.g.*, *Inmates of Suffolk Cnty. Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Johnston v. Maha*, 460 F App'x 11 (2d Cir. 2012); *Bonner v. Alford*, 2015 WL 774738 (5th Cir. 2015); *Graves v. Arpaio*, 623 F.3d 1043 (9th Cir. 2010); *Peoples v. Gilman*, 109 F. App'x 381 (10th Cir. 2004); *Goebert v. Lee Cnty.*, 510 F.3d 1312 (11th Cir. 2007) (all applying the PLRA to pretrial detainees).

Because the rights of pretrial detainees—like other incarcerated individuals—are not the same as those of individuals at liberty, this Court has rejected the constitutional claims of pretrial detainees while emphasizing the need for deference to the difficult judgments made by prison officials. In *Bell*, for example, this Court rejected a number of constitutional claims of pretrial detainees that surely would have succeeded if subjected to the constitutional analysis that governs comparable claims by free individuals. Thus, a ban on most hardback books, an obvious First Amendment violation in most contexts, was upheld as "a rational response by prison officials to an obvious security problem." 441 U.S. at 550. A restriction on most packages from outside the jail was upheld against Fifth Amendment challenge as a "reasonable limitation" "in light of the legitimate security concerns of the institution." *Id.* at 554. Likewise, while reserving the question whether

Fourth Amendment privacy interests even applied in the incarceration context, the Court upheld unannounced cell searches and visual body cavity searches. *Id.* at 558. And the Court rejected the notion that any of these policies amounted to unconstitutional punishment in contravention of the Due Process Clause.[5]

Underlying this Court's unbroken line of cases recognizing that the fact of incarceration fundamentally changes the constitutional analysis is the need for deference to the difficult choices that corrections officials must make on a daily basis. The Court's position on the issue is crystal clear: those officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547 (citing *Jones*, 433 U.S. at 128; *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Meachum v. Fano*, 427 U.S. 215, 228 (1976)); *see Pell*, 417 U.S. at 827 ("Such considerations are peculiarly within the province and professional expertise of corrections officials, and ... courts should ordinarily defer to their expert judgment in such matters."). That deference is comprehensive, covering actions "taken in response to an actual confrontation with" inmates, "just as it does to prophylactic or preventive measures intended to reduce the incidence of these or

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[5] Similarly, this Court upheld a "blanket prohibition" on contact visits as applied to pretrial detainees against a due process challenge in *Block v. Rutherford*, 468 U.S. 576, 588 (1984).

any other breaches of prison discipline." *Whitley*, 475 U.S. at 322.

Lest there be any doubt, this deference is fully applicable to jail officials dealing with pretrial detainees as opposed to post-conviction detainees. In *Bell*, this Court expressly and emphatically rejected the argument that corrections officials should get less deference in pretrial detainee cases than in post-conviction detainee cases. 441 U.S. at 547 n.29. The Court emphasized that deference was appropriate because "the realities of running a corrections institution are complex and difficult" and "courts are ill equipped to deal with these problems." *Id.* None of that depends on whether the particular detainees are being held for trial or after their convictions, and thus the need for deference does not turn "on that happenstance." *Id.*

II. A Pretrial Detainee's Claim Of Unconstitutionally Excessive Force Requires Proof Of A Subjective Intent To Punish.

A. This Court Has Made Clear That What Due Process Proscribes Is Punishment, and That Punishment Requires Intent.

The Due Process Clause governs an excessive force claim by a pretrial detainee, and this Court's precedents clearly establish that what "[d]ue process requires" is "that a pretrial detainee not be punished." *Bell*, 441 U.S. at 535. *Accord Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); *Bell*, 441 U.S. at 535 (a pretrial "detainee may not be punished prior to

an adjudication of guilt in accordance with due process of law."). Thus, "the dispositive inquiry is whether the challenged condition, practice or policy constitutes punishment." *Block*, 468 U.S. at 583.

This Court's precedents make equally clear that "punishment" within the meaning of the Due Process Clause requires a subjective intent to punish. In *Bell*, for example, the Court explained that courts faced with claims of misconduct by prison officials must assess whether "the disability is imposed for the *purpose of punishment* or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538 (emphasis added). In other words, to prove punishment in violation of due process, a detainee must make "a showing of an expressed intent to punish" or establish that such intent may be inferred because the action in question is not "reasonably related to a legitimate government objective." *Id.* at 538-39; *id.* at 539 n.20 ("in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective" (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))).

"Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537. Punishment requires intent. "'The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word [punishment] means today; it is what it meant in the eighteenth century

... '" *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), *cert. denied*, 479 U.S. 816 (1986)). Put simply, "some mental element must be attributed to the inflicting" jail official before his or her conduct "can qualify" as "punishment." *Id.* *See also Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (reasoning that "a subjective approach isolates those who inflict punishment").

B. The Proper Subjective Intent Inquiry for Pretrial Detainee Excessive Force Claims Is the One Identified in *Hudson* and *Whitley*.

This Court's precedents not only make clear that the Due Process Clause forbids punishment and that punishment requires intent, they also identify the requisite intent for a claim of unconstitutionally excessive force in the incarceration context. This Court has considered excessive force claims by incarcerated individuals and the distinctive features of such claims relative to claims based on general prison policies or conditions, in cases like *Hudson v. McMillian*, 503 U.S. 1 (1992), and *Whitley v. Albers*, 475 U.S. 312 (1986). *Hudson* and *Whitley* recognize that corrections officials will inevitably need to use force in furtherance of legitimate penological interests such as maintaining discipline and restoring order. *See Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 321-22. Those decisions also recognize the need for deference to prison officials and the limitations on the judicial role, such that difficult decisions made in the heat of the moment are not routinely subject to judicial second-guessing. *See Hudson*, 503 U.S. at 6; *Whitley*,

475 U.S. at 321-22. Accordingly, the judicial inquiry turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7; *see Whitley*, 475 U.S. at 321-22.[6]

To be sure, this standard for subjective intent was developed by this Court in *Hudson* and *Whitley* in the context of Eighth Amendment claims, rather than in the context of due process claims brought by pretrial detainees. But "that happenstance" is of no moment for multiple reasons. *Bell*, 441 U.S. at 547 n.29. As already established, the critical factor for constitutional analysis is the fact of incarceration, not the status of a detainee as pretrial or post-conviction. *See supra* pp. 18-24. And this Court has routinely relied on cases involving post-conviction detainees to resolve claims by pretrial detainees, and vice-versa. *See supra* pp. 20-21 & n.4. But there is an additional, particularly powerful reason for this Court to extend the subjective inquiry of *Hudson* and *Whitley* to excessive force claims by pretrial detainees—namely, the very case from which this Court derived the *Whitley-Hudson* standard was a due process claim of excessive force by a pretrial detainee.

It is no secret that "[t]his Court derived" the test it applied in *Hudson* and *Whitley* "from one articulated by Judge Friendly in *Johnson v. Glick*." *Hudson*, 503 U.S. at 7. To the contrary, this Court proudly and expressly borrowed the test from Judge Friendly's characteristically thoughtful opinion. *See id.* In

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[6] This intent can be established through direct or circumstantial evidence.

Johnson, the Second Circuit considered a claim brought by a pretrial detainee alleging that he had been assaulted during the prison's booking process. 481 F.2d at 1029. Judge Friendly, writing for the majority, looked to the Due Process Clause in resolving the detainee's excessive force claim. *Id.* at 1032. Describing what it believed to be the appropriate standard for evaluating such a claim under the Fourteenth Amendment, the Second Circuit reasoned as follows:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, *and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.*

Id. at 1033 (emphasis added). When this Court had to fashion a test for the kind of excessive force that violates the Constitution in the prison context, this Court concluded that the final factor listed in *Johnson* properly captured the showing necessary to separate

uses of force that are inherent aspects of the prison environment from those that cross the constitutional line. *Whitley*, 475 U.S. at 320-21; *see also Hudson*, 503 U.S. at 7.

The Court's reliance on a pretrial detainee due process case in establishing the requisite intent for an Eighth Amendment excessive force claim makes three things abundantly clear. First, the distinction between "good faith effort[s] to maintain or restore discipline" and force that is used "maliciously and sadistically for the very purpose of causing harm" was designed to capture whether a detainee has been punished and not whether that punishment was cruel and unusual. Second, any argument that applying this standard in evaluating an excessive force claim under the Due Process Clause is somehow inappropriate is unsupportable. This is less a case of extending the standard from the Eighth Amendment context than a case of returning the test to the due process roots from which it was "derived." *Hudson*, 503 U.S. at 7; *see also Wilson*, 501 U.S. at 300 (Eighth Amendment case relying on *Johnson*); *Whitley*, 475 U.S. at 320-21 (same); *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (same); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (same); *Ingraham v. Wright*, 430 U.S. 651, 669 n.38 (1977) (same).

Third, and more generally, the Court's reliance in *Hudson* and *Whitley*—post-conviction cases—on a decision adjudicating a pretrial detainee's excessive force claim critically undermines the contention that this is a context where courts should draw constitutional distinctions between pretrial and post-conviction detainees. Excessive force claims are

different and difficult in the incarceration context because, in contrast to the situation in free society, detainees and guards are constantly interacting and the incidents of prison life "require and justify the occasional use of a degree of intentional force." *Johnson*, 481 F.2d at 1033. Moreover, the unique aspects of prison life make inquiries by lay judges and juries challenging, such that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Id.* The fact of incarceration and the unique dynamic created in that setting require the courts to distinguish between "good faith," if imperfect, efforts to restore order and harmful conduct designed "for the very purpose of causing harm." *Id.* In short, everything about the sensitive inquiry first articulated by Judge Friendly and later borrowed by this Court flows from the fact of incarceration and not the detainee's precise status.

Even if the *Whitley-Hudson* standard were not derived from a due process case, there would be nothing extraordinary about drawing on Eighth Amendment doctrine to define due process rights. This Court did exactly that in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Lewis*, the Court considered a due process claim brought by the estate of an individual killed as a result of a high speed chase involving police. *Id.* at 836-37. In evaluating that claim, the Court embraced a standard that requires a showing of a subjective intent to harm the suspects being chased. *Id.* at 849-54. That standard, which the Court applied under the Due Process Clause of the Fourteenth Amendment, was drawn directly from the

Eighth Amendment use of force standard articulated in *Whitley*. *Id.* at 853.

In the process of importing the *Whitley* standard, the Court explained that it would be "hard to avoid" analogizing "sudden police chases" to volatile security situations in the incarceration setting. *Id.* Like corrections officials dealing with belligerent inmates, "the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs." *Id.* Both prison officials and police officers in extremis "are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* In light of these considerations, the Court concluded that—as with prison officials operating in the incarceration setting—a showing of "midlevel fault" is not enough. *Id.* "[A] purpose to cause harm," as "is needed for Eighth Amendment liability," is required for "due process liability in a pursuit case." *Id.* at 854.

Of course, no analogies are necessary to justify applying the same legal standards to pretrial and post-conviction detainees. In *Bell*, this Court made clear that there is "no reason to" "distinguish[] between pretrial detainees and convicted inmates in reviewing" challenged prison or jail official conduct. 441 U.S. at 546 n.28. "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Id.* "[T]hose who are detained

prior to trial may in many cases be individuals who are charged with serious crimes," "who have prior records," or who "pose a greater risk of escape than convicted inmates." *Id.* That is "particularly true at facilities like" the Monroe County Jail, "where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted." *Id.*; *see also Block*, 468 U.S. at 587 (discussing comparative dangerousness of pretrial detainees in many circumstances); *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1520-21 (2012) (noting that even "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals" and acknowledging that "jails can be even more dangerous than prisons").[7]

Nor is there anything about the circumstances of this case that would justify a differential rule for pretrial and post-conviction detainees. If a post-

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[7] As noted at the outset, the Monroe County Jail houses a mix of pretrial and post-conviction detainees. Due to limits on the length of a sentence that can be served at the Jail, in Monroe County, prisoners awaiting trial on the full range of potential criminal charges carrying the full range of sentences are housed alongside convicted prisoners serving largely misdemeanor sentences. *See* Wis. Stat. §§973.02 & 302.31. The National Sheriffs' Association's amicus brief reports that this situation is typical: the split between pretrial detainees and convicted prisoners in local jails across the nation is approximately 60/40. Br. for Nat'l Sheriffs' Ass'n 4. The Sheriffs' brief also reports that housing in local jails is not assigned to pretrial detainees and convicted prisoners based on conviction status alone but instead is assigned based on a wide variety of objective classification factors that, taken together, are far better predictors of who can safely be housed with whom within an institution. *Id.* at 6-7.

conviction detainee had displayed Kingsley's level of intransigence and refused to uncover his light, corrections officials would have removed him from his cell and brought him to a holding cell. And if a post-conviction detainee had actively resisted the removal of handcuffs after the transfer, corrections officials would have faced the exact same dynamic and competing choices. They would have confronted the same need to balance the imperatives to keep order and to keep jail staff and other prisoners safe from injury and the need to safely ensure the detainee's compliance. *See Whitley*, 475 U.S. at 320; *Hudson*, 503 U.S. at 6. Likewise, without regard to whether the detainee being transferred was a pretrial or post-conviction detainee, officials would face the same need to act quickly, under pressure, and without time for thoughtful deliberation. *See id.* The "'ever-present potential for violent confrontation and conflagration'" is no less a concern for pretrial detainees than it is for post-conviction detainees. *Whitley*, 475 U.S. at 321 (quoting *Jones*, 433 U.S. at 132).[8]

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[8] The ACLU contends that, despite this Court's extensive case law to the contrary, the fact of incarceration should be deemed irrelevant here because whether someone is a pretrial detainee (as opposed to at liberty pending trial) may at times be impacted by the individual's socioeconomic status. As this Court long ago noted, "no one familiar with even the barest outline of the problems of the administration of a prison or jail, or with the administration of criminal justice, could fail to be aware of the ease with which one can obtain release on bail or personal recognizance." *Block*, 468 U.S. at 583. "The very fact of nonrelease pending trial thus is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility." *Id.* When individuals detained pending trial are not released on bail, it is most often a

In short, while the fact of incarceration fundamentally alters the constitutional analysis, nothing about the precise status of a detainee makes a material difference to the analysis. This Court has already fashioned an appropriate test for excessive force claims in the incarceration context, and it fashioned it from a due process decision. Under these circumstances, there is no sound argument for not applying the *Whitley-Hudson* test to the excessive force claims of pretrial detainees.

C. At a Bare Minimum, a Pretrial Detainee Should Be Required to Prove Subjective Intent Tantamount to Recklessness.

While all of the foregoing strongly counsels in favor of adopting the standard outlined in *Hudson* and *Whitley*, at an absolute minimum this Court should require some showing of subjective intent, with a recklessness standard providing the only viable alternative. As discussed, this Court in *Lewis* drew on the higher subjective standard from use of force cases

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reflection of the fact that they "are awaiting trial for serious, violent offenses," or that they "have prior criminal convictions." *Id.* at 586. Notwithstanding the position taken by the ACLU, independent data compiled by the Department of Justice reveals these observations remain true today. *See*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 201932, *Profile of Jail Inmates, 2002* (rev. 2004). Indeed, in 2002 (the most recent survey year), 57.8 percent of all unconvicted detainees in local jails were being held on violent or drug offenses, and only 20.2 percent were being held on miscellaneous public order offenses. *Id.* at 3, Table 3. At the same time, 57.6 percent of all unconvicted detainees in local jails were recidivists, with 30.7 percent of all unconvicted detainees classified as violent recidivists. *Id.* at 7, Table 9.

(proof of an intent to harm), rejecting the "middle range" standard ("deliberate indifference") that applies to prison policies and conditions where officials have the time and opportunity to make deliberate and considered judgments. That latter standard applies, for instance, to Eighth Amendment claims related to conditions of confinement, failure to provide medical care to prisoners, failure to protect prisoners from violence by other prisoners, and certain claims of municipal liability under §1983. *Lewis*, 523 U.S. at 848-50 & n.10 (citing cases); *see Wilson*, 501 U.S. at 297; *Farmer*, 511 U.S. at 834. This Court has already persuasively explained why that standard is inapposite for the kind of split second decisions at issue in excessive force claims in the incarceration context. *See, e.g.*, *Whitley*, 475 U.S. at 320-22; *Hudson*, 503 U.S. at 6-8. But, if this Court does not adopt the *Whitley-Hudson* standard, at least "deliberate indifference," *i.e.*, "subjective recklessness," *Farmer*, 511 U.S. at 839-840, must be shown, and not merely objective unreasonableness, the "lowest common denominator" due care standard. *Lewis*, 523 U.S. at 848-49.

To be found subjectively reckless, a prison official must know of a substantial risk of serious harm to an inmate and disregard that risk by failing to take reasonable measures to respond to it. *Farmer*, 511 U.S. at 847. Subjective recklessness is subject to proof by typical modes, including through the use of circumstantial evidence. *Id.* at 842. Thus, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.*

Here, the district court instructed the jury on precisely such a recklessness standard, and that instruction was approved by the Seventh Circuit on appeal. JA277-78; JA294-95. Indeed, the jury was charged that, to find for petitioner on his claim of excessive force, it was required to conclude that respondents knew that using force presented a risk of harm to petitioner but nonetheless recklessly disregarded his safety by failing to take reasonable measures to minimize the risk of harm. The jury was permitted to conclude that respondents behaved in such a reckless manner from a non-exclusive list of six factors, *see id.*, drawn directly from *Whitley* and *Hudson*. *Compare* JA295 *with Whitley*, 475 U.S. at 320-21, and *Hudson*, 503 U.S. at 7.

That instruction was unduly favorable to the petitioner, and the district court should have accepted respondents' proposed instruction embodying the higher standard of *Whitley* and *Hudson*. But the district court's instruction plainly required a finding of subjective recklessness, which at least gives some meaning to this Court's teaching that punishment under the Due Process Clause requires some intent to punish. As the Seventh Circuit correctly reasoned, it is "clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases" and the district court's instruction "reflected this requirement." JA307.

Because the jury was instructed under the less-stringent recklessness standard—and Degner and Hendrickson prevailed—the officials necessarily would have also prevailed under the more rigorous

Whitley-Hudson standard. *See Whitley*, 475 U.S. at 320-21 (describing the malicious and sadistic intent to harm standard as stricter than the deliberate indifference standard); *Hudson*, 503 U.S. at 5-12 (describing both an objective and a subjective component to an excessive force claim under the Eighth Amendment). As a result, whether this Court adopts the higher standard demanded by *Whitley*, *Hudson*, and Judge Friendly or the middle-ground subjective recklessness standard embodied in the district court's instruction, the judgment entered in favor of respondents following a 3-day jury trial should be affirmed.

D. A Subjective Intent Requirement Is Necessitated by the Realities of Litigating Excessive Force Claims.

A subjective intent requirement strikes the proper balance between protecting the constitutional rights of prisoners and shielding corrections officials from costly and time-consuming litigation. While most free individuals interact with police officers only episodically (if ever), incarcerated individuals constantly interact with corrections officials in ways that give rise to countless opportunities for friction, potential insubordination, and the possible use of force. Moreover, incarcerated individuals are not only in constant contact with state actors, but because of their incarceration they have substantial time to contemplate potential litigation. Both Congress and this Court have recognized this reality and in various ways made it more difficult for suits by prisoners to be brought (principally through the PLRA) and to succeed (principally through doctrines of deference

like that of *Turner v. Safley*). In the specific context of excessive force claims by incarcerated individuals, it is the standard of *Whitley* and *Hudson* that protects against a relative flood of claims. The vast majority of courts already have applied the *Whitley-Hudson* standard to pretrial detainee excessive force claims.[9]

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[9] *See, e.g., United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("Because all excessive force claims in the prison context are qualified, ... we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well"); *Fuentes v. Wagner*, 206 F.3d 335, 347-48 (3d Cir. 2000) ("We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance."); *Carr v. Deeds*, 453 F.3d 593, 605 (4th Cir. 2006) ("[E]xcessive force claims of pretrial detainees are governed by the Due Process Clause," and "[t]he proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (quotation marks and citations omitted); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993) (noting that "it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security"); *Shreve v. Franklin Cnty.*, 743 F.3d 126, 134 (6th Cir. 2014) (affirming earlier holding that Eighth Amendment standard applies to excessive force claims by pretrial detainees in "rapidly evolving, fluid, and dangerous predicament[s] which preclude the luxury of calm and reflective pre-response deliberation"); *accord Young v. Wolfe*, 478 F. App'x 354, 356 (9th Cir. 2012); *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir. 2005); *Norris v. District of Columbia*, 737 F.2d 1148, 1150 (D.C. Cir. 1984) (citing to *Johnson v. Glick* formulation of standard, including question of whether force was used "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"). Moreover, the Eighth and Tenth Circuits apply a standard that looks to

If this Court endorses a less rigorous standard, it will inevitably produce a jump in the number of excessive force cases brought by pretrial detainees.

In many contexts, corrections officials are protected by qualified immunity rules that shield public servants who do not violate clearly established constitutional norms. But qualified immunity will not provide robust protection for corrections officials if this Court accepts petitioner's invitation to adopt a purely objective reasonableness standard. Courts have found it particularly difficult to apply qualified immunity when the underlying constitutional norm prohibits unreasonable conduct. In both *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Saucier v. Katz*, 533 U.S. 194 (2001), this Court corrected decisions by lower courts that could not perceive how an officer could be "reasonably unreasonable" in conducting a search or using force. And despite *Saucier v. Katz*, lower courts commonly view excessive force claims as too fact-bound to admit of application of a qualified immunity defense, as this case well-illustrates. Both the allegations in this case and in a separate case in which petitioner alleged that he was a victim of excessive force resulted in jury trials, even with the application of a subjective standard. In both cases, the corrections officials prevailed, but only after incurring the expense and disruption of a full-blown jury trial. Given the constant interaction of corrections officials and incarcerated individuals, and the inherent ability of a recalcitrant detainee to prompt a confrontation

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subjective intent and is not wholly objective. *See, e.g.*, *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir. 2014); *Booker v. Gomez*, 745 F.3d 405, 423, 426 (10th Cir. 2014).

through insubordination and intransigence, excessive force claims in the incarceration context are easy to allege and hard to disprove. The more demanding *Whitley-Hudson* standard provides corrections officials with a desperately needed layer of protection in such cases.

Last but by no means least, a standard that requires proof of bad intent and objective excessiveness is necessary to ensure that jail officials like Degner and Hendrickson are not held liable for doing nothing more than following their training. The facts here amply demonstrate that the only way Degner and Hendrickson could possibly be held liable is if a jury is permitted to second guess the amount of force employed—an amount Degner and Hendrickson had long been instructed they could employ under the circumstances. The jail officials' thoughtful approach and measured response to petitioner's belligerence make it highly unlikely that any jury would conclude Degner and Hendrickson acted maliciously and sadistically. But if the only question is whether they acted reasonably, there is a very real risk that a jury might hold them liable for conduct that "may later seem unnecessary in the peace of a judge's chambers." *Johnson*, 481 F.2d at 1033.

III. Importing The Purely Objective Test Applied To Excessive Force Claims Brought By Free Individuals Into The Incarceration Setting Is Unnecessary And Ill Advised.

Rather than employ a standard tailor-made for the incarceration context and derived from a seminal due process case, petitioner would have this Court fashion a constitutional standard from the Fourth

Amendment test that governs the use of force against free individuals. That proposed course has nothing to recommend it.

To the extent petitioner would simply borrow the standard applicable outside prison walls without any adjustment for the realities of incarceration, that would ignore decades of precedents making clear that the fact of incarceration fundamentally alters the constitutional rights of pretrial and post-conviction detainees alike. But to the extent petitioner envisions lay judges and juries taking into account the realities of prison life as part of an all-encompassing inquiry into whether the force used was reasonable, that approach suffers from both doctrinal and practical defects. Such an approach makes little sense doctrinally, because not every unreasonable use of force amounts to punishment, and punishment is what the Due Process Clause forbids. It would also ignore this Court's repeated admonitions about the need to defer to the difficult judgments made by corrections officials. And this approach has little to recommend it practically; there is no need to adjust a Fourth Amendment standard for the realities of incarceration when this Court has already developed a standard applicable to excessive force claims in the incarceration context, namely the *Whitley-Hudson* standard.

The United States, for its part, attempts to derive a purely objective standard from *Bell*. But *Bell* quite clearly provides just the opposite, making clear that the dispositive inquiry is whether there is punishment, which clearly requires a subjective showing. In a final last ditch effort, petitioner argues

for the first time in this Court that the Fourth Amendment can apply directly such that each use of force against a detainee is a new seizure that can be tested for reasonableness. That proposal is forfeited, but in all events would work a revolution in prisoner litigation, as its logic would apply equally to all detainees, despite the well-established *Whitley-Hudson* standard. In the end, it is that well-established test, and neither a novel reading of *Bell* nor a revolutionary theory of the Fourth Amendment, that should govern excessive force claims like petitioner's.

A. Adopting the Fourth Amendment Standard Wholesale in the Incarceration Context Would Ignore Decades of Precedent Making Clear That the Fact of Incarceration Fundamentally Changes the Constitutional Analysis.

To the extent that petitioner's argument proceeds from the premise that detainees, whether convicted or not, stand on the same constitutional footing as free individuals, it is a non-starter. That proposition is fundamentally incompatible with an entire line of this Court's cases going back decades. As this Court has made clear in the specific context of pretrial detainees, "[a] detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Bell*, 441 U.S. at 546; *see supra* Part I.

Here, petitioner was not a free citizen during the incident in question, and his rights are simply not the same as those of individuals at liberty entitled to the full protection of the Fourth Amendment. Thus, it makes little sense for the analysis of his excessive

force claim to be premised on the principles that govern the claims of individuals who are at full liberty. The expectations of an individual buying orange juice at a convenience store, *see Graham*, 490 U.S. at 395, have no direct application to an individual who has spent 30 days in a county detention center after multiple court appearances.

In too many contexts to catalog, this Court has applied constitutional principles to detainees, pretrial and post-conviction alike, in ways that bear little resemblance to comparable claims by free individuals. In *Block*, for instance, the Court upheld against a Fifth Amendment challenge a ban on contact visits, 468 U.S. at 588, and, in *Bell*, the Court upheld a ban on most hardback books, 441 U.S. at 550. Restrictions that would be obviously unconstitutional outside prison walls are upheld as reasonable, non-punitive measures in the unique setting of incarceration. Thus, to whatever extent petitioner would suggest that Fourth Amendment principles should apply more or less unmodified to pretrial detainees, the argument is simply not tenable.

B. Applying a Modified Fourth Amendment Test Is Doctrinally Incoherent and Practically Unworkable.

To the extent petitioner's proposal is to borrow the Fourth Amendment's protection against unreasonable uses of force and then have the realities of prison life inform what is reasonable, that proposal makes no sense either practically or doctrinally. From a practical standpoint, once it is conceded that the constitutional standard for excessive force claims by free individuals needs to be adjusted for the fact and

realities of confinement, then there is no good reason not to apply the test already developed by this Court for the specific context of excessive force claims by incarcerated individuals, *i.e.*, the *Whitley-Hudson* standard. Indeed, there is no reason to borrow and adjust when this Court has already developed a standard that is tailor-made for the incarceration context.

Importing an objective reasonableness standard from the Fourth Amendment into the Fourteenth Amendment excessive force claim analysis also makes little sense doctrinally. The text of the Fourth Amendment is the source of the constitutional protection against the use of excessive force by police officers in the course of investigatory stops, arrests, or other seizures of free individuals. *See Graham*, 490 U.S. at 395. That explicit language—the right of individuals "to be secure in their persons ... against unreasonable ... seizures"—is the source of the objective reasonableness standard that governs excessive force claims in those contexts. *Id.* at 394-99. But incarcerated individuals have already been lawfully seized in ways that fully comport with the Fourth Amendment. It is the Due Process Clause that protects them, and there is no such textual source for a similar objective reasonableness test in the Due Process Clause.

By contrast, the *Whitley-Hudson* excessive force standard has been explicitly "derived" from a due process standard, *Hudson*, 503 U.S. at 7, and makes doctrinal sense. The Due Process Clause forbids the punishment of pretrial detainees, punishment requires an intent to punish, and the *Whitley-Hudson*

standard captures the requisite intent to punish in the incarceration context. Indeed, even outside the incarceration context, this Court has applied the *Whitley-Hudson* standard when the free individual's protection flowed from the Due Process Clause, rather than the Fourth Amendment. *See Lewis*, 523 U.S. at 836-37.

The Fourth Amendment inquiry into objective reasonableness is a misfit in a due process inquiry for the straightforward reason that not every use of force that appears unreasonable with the benefit of hindsight constitutes punishment. It is thus entirely unsurprising that a different standard would exist for excessive force claims under the Fourth and Fourteenth Amendments because the term "'punishment[]' clearly suggest[s] some inquiry into subjective state of mind, whereas the term 'unreasonable' does not." *Graham*, 490 U.S. at 398. Given that difference, it only makes sense that the due process standard would be built on doctrine defining "punishment"—not transplanted from the different text of a distinct constitutional provision—and that also satisfies the requirement that "punishment" be established through a showing of subjective intent to punish. *See, e.g.*, *Wilson*, 501 U.S. at 300 ("The infliction of punishment is a deliberate act intended to chastise or deter.").

Importation of an objective reasonableness standard would also run afoul of this Court's considered conclusion that negligence is insufficient to establish a constitutional violation under the Fourteenth Amendment. For example, in *Lewis*, this Court expressly rejected a mere reasonableness

standard under the Fourteenth Amendment. *Lewis*, 523 U.S. at 848 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976), and *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). Due care is not the standard that governs such claims, as "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849 (citing *Daniels*, 474 U.S. at 328, and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). As this Court explained in *Daniels*, "lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person" and "[t]o hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." 474 U.S. at 332.

Despite this Court's emphatic rejection of negligence as the threshold for a due process violation, petitioner proposes just that. If corrections officials violate the Constitution every time their use of force is deemed unreasonable, then it is hard to understand the due process test as anything other than a requirement that they use due care, or due force, whenever they face the difficult decision to use force on an uncooperative and potentially dangerous detainee. This much is made plain by petitioner's own comparison of his proposed standard to an "objective reasonableness" training standard used for certain detention officials. *See* Pet'r Br. 25-26. The violation of a training manual may provide some evidence of negligence or liability under other state tort law, but it does not amount to unconstitutional punishment or otherwise violate due process. *See, e.g.*, *Daniels*, 474 U.S. at 332 ("Far from an abuse of power, lack of due care suggests no more than a failure to measure up to

the conduct of a reasonable person"); *Lewis*, 523 U.S. at 849 ("the Constitution does not guarantee due care on the part of state officials").

As the brief submitted by the corrections amici suggests, local corrections practices throughout the Nation are already closely dictated and monitored by and through state statutes, administrative regulations, training standards, and departmental policies. And it is self-evident that the violation of such standards might lead to internal discipline, closer scrutiny or control by regulatory bodies, liability under state or local law, or even the imposition of a judicial consent decree. But state and local laws do not define the parameters of the Constitution. *DeShaney v. Winnebago Cnty. Soc. Serv. Dep't*, 489 U.S. 189, 202 (1989). And the existence of myriad remedies under state and local law for unreasonable force by corrections officials provides yet another compelling justification for not interpreting the Due Process Clause as the first and final arbiter of what constitutes a lack of due care in this context. *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984); *McMillian*, 503 U.S. at 28-29 (Thomas, J., dissenting).[10]

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[10] It is important to note that the corrections amici do not accurately characterize many of the principal sources they cite in support of the proposition that a consensus exists in the corrections field in favor of an objective reasonableness standard. *See, e.g.*, American Correctional Association, *Adult Local Detention Facilities*, Standard 2B-01 at 32 (4th ed. 2004) (stating that, "[i]n no event is physical force used as punishment"); LETRA, Inc., *Model Use of Force Policy*, §7.0.12b (Oct. 29, 2014) ("Staff are expected to use force, when necessary, within that reasonable range, to act in good faith ... "); ABA,

But the problems do not end there. Petitioner's proposed purely objective test cannot be squared with this Court's body of deference precedent. That precedent mandates "that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322. And that deference applies with particular force to actions "taken in response to an actual confrontation with" an inmate, *id.*, and applies equally to actions respecting both pretrial and post-conviction detainees, *Bell*, 441 U.S. at 547 n.29.

A purely objective standard provides no deference. By definition, such a standard would ask a judge or jury to decide whether a jail or prison official's actions were reasonable under the facts and circumstances as they existed at that time. That is exactly the sort of second guessing that this Court's deference precedents

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Standards for Treatment of Prisoners, Standard 23-5.6 (stating that corrections officials should not use force "to gratuitously inflict pain or suffering, punish past or present conduct ... "); Letter from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Division, to Marlin N. Gusman, Orleans Parish Criminal Sheriff, at 4 (Sept. 11, 2009) (stating that the Eighth and Fourteenth Amendments forbid the use of excessive force against inmates and pretrial detainees and that "[t]he standard for measuring the appropriateness of the force used is 'whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'") (quoting *Hudson*, 503 U.S. at 6, quoting *Johnson*, 481 F.2d at 1033). Regardless, while the various model policies, departmental guidelines, statutes, and regulations cited by the corrections amici address to varying degrees what might be expected of corrections officials under state law or by way of local departmental practice, *none* addresses the standard set by the Due Process Clause.

unequivocally forbid. Such second guessing would immeasurably increase the already "inordinately difficult" task of running a corrections facility, an outcome this Court has been trying to avoid for at least 40 years. *Turner*, 482 U.S. at 854; *see Bell*, 441 U.S. at 547. Such a non-deferential test will also lead to more litigation, contrary to Congress' judgment in the PLRA. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted" the PLRA "to reduce the quantity ... of prisoner suits."). And petitioner's reasonableness standard is one that courts have struggled to apply in a way that provides corrections officials with meaningful qualified immunity. *See supra*.

There is one final problem with petitioner's purely objective standard: it is not what they argued below. Before the Seventh Circuit, petitioner explicitly disavowed any argument that the applicable constitutional standard is purely objective. *See* CA7 Appellant Reply Br.2 ("Appellees wrongly attempt to recast the standard advocated by [petitioner] as a 'wholly objective' standard. ... However, Appellees' attempted revision fails because [petitioner] did not argue that the Fourteenth Amendment requires a 'wholly objective' approach."). That concession simply underscores that while the purely objective standard is an appropriate Fourth Amendment protection for free individuals, it is a misfit when it comes to the due process claims of incarcerated individuals.

C. *Bell* Does Not Establish an Objective Standard.

Both petitioner and the government attempt to read a purely objective test into this Court's decision

in *Bell*. Pet'r. Br.19; U.S. Br.15. But *Bell* held the opposite, making clear that the dispositive inquiry was whether the challenged policies inflicted punishment. What petitioner and the government try to characterize as an independent and purely objective inquiry into government goals and their relationship to conditions of confinement was merely a proxy for determining the subjective intent of jail officials. This is made clear at the very least by the sentence in *Bell* that immediately follows the portion of the opinion excerpted by petitioner, *see* Pet'r. Br.18:

> [I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 539.

Petitioner further misconstrues *Bell* in equating the due process standard that case employs to evaluate conditions of confinement claims with the Fourth Amendment objective reasonableness analysis. Indeed, under *Bell*, absent an express intent to punish, an institutional policy creating a particular condition or restriction for the incarceration of pretrial detainees passes muster under the Due Process Clause so long as any rational explanation reasonably related to the condition or restriction in question can be articulated. Put differently, if the condition or restriction at issue is not altogether arbitrary or purposeless, it is not unconstitutional. *Id.* at 538-39. That analysis may apply more directly to challenges

to conditions and policies than to individual uses of force, but it reflects the reality that the use of force as a general matter is rationally related to preserving order and maintaining discipline. Thus, the question naturally turns to whether the specific use of force violates the Constitution, and the subjective test of *Whitley-Hudson* is tailor-made to answer that question.

The government is ultimately forced to concede, with considerable understatement, that there is no "clear" support in this Court's cases for the position that the *Bell* test includes an objective prong completely divorced from a finding of intent. U.S. Br.15. In reality, this Court's cases make clear that *Bell*'s two prong inquiry is designed to identify punitive *intent* and does not smuggle in an entirely new and "independent *legal* basis for classifying governmental action as punitive." *Id.* First, it is clear from cases like *Youngberg v. Romeo*, 457 U.S. 307 (1982), that the inquiry looks not to objective reasonableness, but to the presence or absence of any rational professional judgment. In *Youngberg*, the Court examined a due process claim brought by the mother of a disabled individual involuntarily committed to a state mental hospital. The specific challenge brought by the mother related to physical restraints utilized by the institution with her son and the level of training provided to her son in the facility. 457 U.S. at 315-17. Citing *Bell*, among other cases, the Court concluded that due process protections demanded only that professional judgment have been exercised by the treating professionals at the institution and that it would not be appropriate for a court to select among different professionally

appropriate choices that might have been made. *Id.* at 321-22. According to the Court, only in the *complete absence* of any professional judgment could liability have been imposed. *Id.* at 323.

Likewise, petitioner ignores the full holding of *County of Sacramento v. Lewis*, 523 U.S. at 833, which, as explained, supports adoption of the *Whitley-Hudson* standard. Petitioner correctly notes that the *Lewis* Court observed that general principles of due process prohibit arbitrary governmental action or the exercise of governmental authority without any reasonable justification. 523 U.S. at 845-46. But, far from adopting an objective test for arbitrary or wholly unjustifiable government action, the Court in *Lewis* went on to hold in the context of high speed police pursuit cases that the Due Process Clause requires a specific showing that the defendant officers subjectively intended to harm the suspects being pursued. *Id.* at 854. Indeed, *Lewis* preferred this more demanding subjective standard over even a middle ground subjective standard of criminal recklessness—*i.e.* deliberate indifference. *Id.* at 849-54. To suggest that *Lewis* supports the conclusion that a purely objective standard applies to due process claims such as petitioner's is to ignore the holding of the case.

D. The Fourth Amendment Does Not Apply Directly Because the Use of Force During Pretrial Detention Does Not Effect a Fourth Amendment Seizure.

For the first time in this litigation, petitioner makes the radical alternative argument that the Fourth Amendment applies directly to the use of force

against pretrial detainees, such that each use of force is a continuing or new seizure that must be measured for reasonableness. As an initial matter, this argument is forfeited. Petitioner did not make this argument to the district court in objecting to the jury instruction on excessive force. JA229-33. Nor did petitioner raise it on appeal to the Seventh Circuit. *See* CA7 Appellant Br.11; CA7 Appellant Reply Br.2. Accordingly, the Seventh Circuit did not pass on this novel theory. For these reasons, it is not properly before this Court. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989). In all events, petitioner's failure to raise this argument below was entirely prudent as this novel argument would work a revolution in prisoner litigation and is entirely incompatible with this Court's precedents.[11]

Petitioner's contention that pretrial detainees are "subject to a continuing seizure" as a result of their detention is contrary to logic and wholly unsupported by this Court's cases, as the government's brief demonstrates. *See* U.S. Br.20-22. Placement in

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[11] Petitioner concedes that "he was being lawfully detained and awaiting trial" and that "the initial seizure of his person was arguably complete." Pet'r. Br.32. In fact, as petitioner points out, by the time of the events in question on May 21, 2010, petitioner had been in custody a full 30 days and already had been before a judicial officer three times. *Id.* at 3 n.1 & 30 n.10. Whether or not an open question remains as to the precise point at which the protections of the Fourth Amendment end and those of the Fourteenth Amendment begin, petitioner clearly was no longer an arrestee on the day at issue, and petitioner makes no such argument to this Court.

detention is what "results in restricting the movement of [the] detainee," *Bell*, 441 U.S. at 537, not any later use of force against the detainee, who remains unalterably seized during his entire period of detention. The cases petitioner invokes are not to the contrary, and do not even consider whether pretrial detainees remain subject to the Fourth Amendment throughout their detention. Petitioner argues in the alternative that each additional "physically intrusive" restriction on a criminal detainee's freedom of movement constitutes a *new* seizure that is governed by the Fourth Amendment. But, as the government observes, that novel theory is also completely unsupported by any case from this Court, and the cases petitioner does cite do not involve incarcerated persons at all but instead address Fourth Amendment seizure claims raised by free individuals. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991); *Graham*, 490 U.S. at 386; *Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Brower v. Cnty. of Inyo*, 489 U.S. 593 (1989).

More fundamentally, petitioner's contentions are incompatible with this Court's precedents and would work a revolution in prisoner litigation. Far from scrutinizing state officials' actions to find distinct, new seizures governed by the objective reasonableness standard of the Fourth Amendment, in *Hudson v. Palmer*, 468 U.S. 517, 526 (1984), this Court held in the context of convicted prisoners that the Fourth Amendment is *inapplicable* to searches of prison cells. And in *Bell*, this Court reserved the question of whether the Fourth Amendment had any application in the incarceration context, but rejected challenges to cell searches and visual body cavity searches on

reasoning that was premised on the inapplicability of normal Fourth Amendment principles. *See* 441 U.S. at 556-57 (noting that "even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search").

Petitioner's proposed Fourth Amendment approach would multiply the opportunities for prisoner litigation exponentially, as searches and seizures are ubiquitous in the incarceration context. Presumably, under petitioner's theory, the Fourth Amendment would come into play every time jail guards forcibly move a detainee from one cell to another, every time a detainee is stopped against his or her will while moving from the mess hall back to a housing area, and every time a detainee is stopped and searched for contraband.

Worse still, as the government underscores, petitioner's new rule could not logically be cabined to apply only to pretrial detainees, and instead would apply equally to any new restrictions or intrusions made on *convicted* prisoners who would otherwise be governed by the Eighth Amendment. *See* U.S. Br.22. Such an approach is wholly incompatible with *Whitley*, *Hudson*, and a host of other precedents, which underscores that petitioner's theory is fundamentally misguided.

IV. If The Court Were To Side With Petitioner As To The Appropriate Standard For Excessive Force Claims, Affirmance Would Still Be Required.

Even if this Court were to adopt a Fourth Amendment objective reasonableness standard for pretrial detainee excessive force claims, affirmance

would still be required for two independent reasons. First, that was clearly not the law of the Seventh Circuit at the time of the events in question. Thus, Hendrickson and Degner are entitled to qualified immunity. Although qualified immunity has proven difficult for courts to apply in run-of-the-mill excessive force cases, those problems would not be present here. If this Court adopts an objective reasonableness test, it would clearly be changing the governing law of the Seventh Circuit. The jury was instructed consistent with the law of the Seventh Circuit, and respondents prevailed under that standard after a three-day jury trial. If the law now changes, it should not deprive respondents of qualified immunity since the reasonableness of their actions is governed by the clearly established law at the time of their challenged primary conduct. Contrary to the government's suggestion, there is no need for a remand on this question. If this Court resolves the purported circuit split, rejecting the Seventh Circuit standard in favor of a more detainee-friendly standard, the applicability of qualified immunity would be self-evident.

Qualified immunity assures that officials "will not be held personally liable as long as their actions are reasonable in light of" current law. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). "'[E]xisting precedent must have placed the statutory or constitutional question' confronted" "'beyond debate'" in order for qualified immunity to be unavailable. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

A Fourth Amendment objective unreasonableness standard was manifestly not the law governing excessive force claims brought by pretrial detainees when petitioner was detained at Monroe County Jail. As the Seventh Circuit explained, the precedents of that court "recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind" when evaluating a pretrial detainee's excessive force claim. JA303; JA307 ("our cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases"). Should this Court adopt an objective reasonableness standard for excessive force claims brought by pretrial detainees, it would be establishing a new standard of liability for such claims, and that standard would come too late to deprive respondents of qualified immunity.[12]

Second, if the Court sides with petitioner on the appropriate standard, it could hold—as the government suggests—that the district court's instructions "are most fairly read" to reflect that standard. U.S. Br.9; *id.* at 29 ("the jury instructions

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[12] Petitioner suggests in his opening brief that respondents failed to preserve the qualified immunity issue. Pet'r. Br.9 n.3. Not so. Hendrickson and Degner have raised qualified immunity at every turn. Respondents first sought qualified immunity as part of their summary judgment motion. R.28, pp. 18-22. Respondents next argued for qualified immunity in their Rule 50 motions at trial. R.158, pp. 83-85. And respondents preserved their qualified immunity argument on appeal before the Seventh Circuit. CA7 Appellee Br.28-29. Respondents also raised the qualified immunity issue in their brief in opposition to certiorari. Opp. at 17 n.1 ("Incidentally, even if the Court were" to side with petitioner, respondents "would be entitled to qualified immunity.").

nearly mirrored the Fourth Amendment approach that petitioner favors"). Though that is not the view of the instructions that the district court or the Seventh Circuit embraced, to the extent this Court finds the government's argument persuasive, that argument too would require affirmance even in the wake of the adoption of a purely objective standard.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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